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No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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We have three observations concerning respondents' brief in opposition to the petition for a writ of certiorari.

1. Respondents argue (Br. in Opp. 9-14) that there is no conflict among the circuits warranting this Court's intervention. But the conflict is obvious. The Second Circuit in this case construed 42 U.S.C. (Supp. IV) 405(b) to require the imposition of judicial time limits on the Social Security adjudication process, while the Seventh Circuit in *Wright* v. *Califano*, 587 F.2d 345 (1978), declined to do precisely that. Respondents argue that although the Seventh Circuit in *Wright* "reached a conclusion seemingly at odds" with the decision below and other cases (Br. in Opp. 12), *Wright* is distinguishable because it involved the processing of claims for old age and survivors benefits, while the instant case involves claims for disability benefits. This effort to distinguish the two cases is wholly unavailing. The old age

and survivors benefits involved in *Wright* and the disability benefits at issue in the instant case all are paid pursuant to Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, and the hearings under the programs are conducted by the same corps of administrative law judges pursuant to the same statutory authority, 42 U.S.C. (Supp. IV) 405(b).

There is, moreover, no indication that the Seventh Circuit in *Wright* regarded the particular benefits claimed as a relevant factor. To the contrary, the court explicitly declared its disagreement with the Second Circuit's position and stated that by considering the agency's resource limitations and expanding caseload, not merely the individual claimants' interests, it viewed the timing problem in a "broader context" than did the Second Circuit in *Barnett* v. *Califano*, 580 F.2d 28 (1978), and the First Circuit in *Caswell* v. *Califano*, 583 F.2d 9 (1978). See 587 F.2d at 351. See also *id.* at 354 n.15 (other circuits "have taken a contrary view"); Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959 (1979) (explaining that *Wright* conflicts with the Second Circuit's approach). In addition, although the Sixth Circuit in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (1978), concluded that the processing times involved there were unreasonable, it explicitly rejected the First and Second Circuits' approval of judicially imposed time constraints. See 587 F.2d at 334-336.

Thus, there plainly is a conflict among the circuits on the basic issues in this case. The proliferation of such cases in the lower courts and the varying decrees that have been entered (see Pet. 12-18 & nn.13, 14 & 16) necessarily will

exacerbate HHS's difficulties in administering its nationwide benefit programs in the future.[1]

2. Respondents claim (Br. in Opp. 21-26) that Vermont, the state directly involved in this case, is not an "ideal laboratory" (*id.* at 21) for consideration of the Social Security processing backlogs. They initially contend (*id.* at 21-23) that the court of appeals' imposition of judicial time limits and interim benefit requirements is unlikely to burden the Social Security Administration (SSA) severely because the decision applies only to Vermont, a small rural state. But, as we explain in the certiorari petition (at 15-18), the issue of processing times in Social Security cases is one of nationwide dimensions. It already has been the subject of a number of different court orders, including ones applying to the much larger States of New York and Connecticut in the Second Circuit alone. See Pet. 7, 12 n.12, 16 n.17. Indeed, the court of appeals in this case acknowledged that its decision "may have a significant impact on [SSA's] operations" (Pet. App. 6a).

Respondents also argue (Br. in Opp. 24-25) that recent amendments to the Social Security Act affecting cases in which benefits have been terminated (Pub. L. No. 97-455, 96 Stat. 2497) weigh against review in the instant case. Precisely the opposite is true. Sections 2 and 4 (96 Stat. 2498, 2499) of the recent amendments provide for face-to-face hearings by state agencies at the reconsideration stage in benefit termination cases and further provide, until the end of this fiscal year, for the continued payment of benefits in termination cases through the ALJ stage of the administrative appeals process. Congress did not, however, impose any comparable requirements in the processing of new

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[1]We have been informed by HHS that 34,808 requests for ALJ hearings were received in the month of March 1983, the most ever received in one month in the history of the Social Security program.

applications for benefits. These amendments demonstrate that when Congress believes that the payment of interim benefits is appropriate because of the possible hardship that might result from the passage of time prior to an ALJ hearing, it has expressly authorized their payment. In limiting the availability of interim benefits under the 1982 amendments, Congress reasonably could conclude that persons who are already receiving benefits have a greater interest in receiving such benefits pending an ALJ decision than do persons who are applying for benefits for the first time and thus are not yet dependent upon them. The 1982 amendments also demonstrate that Congress' response to the hearing delay problem was not to impose deadlines on the ALJ hearings conducted by HHS, as the court below did, but to afford an additional opportunity for a face-to-face hearing at the earlier reconsideration stage of the appeals process conducted by the States, and then only in termination cases. These limited amendments therefore underscore the inappropriateness of ad hoc judicial orders imposing a patchwork of inconsistent processing requirements in various parts of the country.

Nor can the 1982 amendments confidently be expected to have a significant effect on the ALJ hearing process as a practical matter. We have been informed by HHS that benefit termination cases account for only approximately 30% of all ALJ hearing requests. Moreover, although it is possible that some ALJ hearings might be rendered unnecessary in termination cases if meritorious claims are identified in the face-to-face hearings that are now required at the reconsideration stage, any such decrease might well be offset by an increase in requests for ALJ hearings in termination cases by those who lose at the reconsideration stage because, under the 1982 amendments, those claimants can now continue to receive benefits if they request an ALJ hearing.

3. Respondents attempt to support the court of appeals' "interim payment sanction" by contending that "there exists no legal authority barring the * * * sanction" (Br. in Opp. 19). In fact, of course, Congress' express provision for payment of interim benefits in certain situations — termination cases — strongly indicates that such benefits are barred in all others. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981). In any event, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion). There is no affirmative authorization for payment of interim Social Security benefits in non-termination cases. Respondents' view that the courts nonetheless may order payment of interim benefits as an "equitable remedy" also conflicts with *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), where this Court held that the equitable doctrine of estoppel does not permit a court to order the payment of benefits under the Social Security Act where the statutory eligibility requirements have not been satisfied.[2]

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[2]Citing *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947), and *Hutto* v. *Finney*, 437 U.S. 678, 690-691 (1978), respondents argue (Br. in Opp. 20) that monetary payments contingent upon non-compliance with an injunction represent a traditional way of enforcing an injunction. However, the discussion in those cases concerned monetary penalties imposed upon a party who had been held in contempt for violating a previous order. The prospective ordering of the payment of interim benefits in the instant case did not rest on the court's exercise of its contempt power.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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